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OFFICE OF PETITIONS

In re Application of
Cavanaugh

Application No. 10/002,690

Filed: December 5, 2001

Attorney Docket No. N/A

For: METHOD FOR THE DETECTION
AND MEASUREMENT OF HAPten-
CONJUGATED BIOLOGICAL BINDING
ENTITIES BY WESTERN AND DOT-
BLOT USING ANTI-HAPten
ANTIBODIES

: DECISION DISMISSING PETITION

This is a decision on the paper entitled "Petition to Reconsider Priority" filed November 23, 2004, which is being treated as a petition requesting that the above-identified application be accorded a filing date of no later than November 28, 2001.

Petitioner indicates that this application was mailed by first class mail to the Office on November 19, 2001. Petitioner argues that receipt of the application was delayed because there were postal delays in the Washington DC area in November 2001 due to the anthrax scare. The application papers were received in the Office on December 5, 2001. Petitioner assumed the Office would afford special consideration to correspondence mailed in November 2001. While petitioner has not requested that the application be accorded a particular filing date, it is obvious from the petition that petitioner desires that the Office accord this application a filing date within 12 months of the filing date of provisional application no. 60/253,336 – which is November 28, 2001 at the latest.

35 U.S.C. 21(a) provides that:

The Director may by rule prescribe that any paper or fee required to be filed in the Patent and Trademark Office will be considered filed in the Office on the date on which it was deposited with the United States Postal Service or would have been deposited with the United States Postal Service but for postal service interruptions or emergencies designated

by the Director.

The Director may, but is not required to, accept the mailing date as the filing date. The Director has determined that only the "Express Mail" procedure can be used for this purpose because the use of "Express Mail" provides very specific identifying information in advance which establishes both the date of mailing and the particular papers being filed.

Because the filing date of an application is much more critical than the filing date of papers accepted under 37 CFR 1.8, the USPTO promulgated a separate rule, 37 CFR 1.10, which sets forth a specific procedure which must be followed in order to establish the filing date as the date of deposit with the United States Postal Service (USPS) instead of the date of receipt in the Office.

The procedure in 37 CFR 1.10 requires the use of the "Express Mail Post Office to Addressee" service of the USPS. Correspondence sent by the "Express Mail Post Office to Addressee" service is considered filed in the Office on the "date-in" entered by the USPS. If the USPS deposit date cannot be determined, the correspondence will be accorded the date of receipt in the Office as the filing date. If the procedure is not followed, applicants bear the risk of any delay in the delivery of the application papers to the Office.

In the instant petition, there is no allegation that the application papers deposited on November 19, 2001, with the USPS as first class mail to the Office, were deposited in compliance with the "Express Mail" procedures set forth in 37 CFR 1.10. Petitioner had the option of depositing the application papers in "Express Mail" service on November 19, 2001, in order to obtain the benefits of 37 CFR 1.10. Had petitioner followed the procedure set forth in 37 CFR 1.10, the application could have been accorded a filing date as of the date of deposit in "Express Mail." Thus, petitioner could have avoided the instant predicament merely by following the procedures established by the Director. Instead, petitioner chose to deposit the application papers in first class mail and, as such, assumed the risk of any delay in the delivery to the Office. Petitioner's failure to take advantage of the established procedures is not a justification for accepting a date based upon the November 19, 2001 mailing of the instant application papers by first class mail as the filing date of the above-identified application. Therefore, the application is only entitled to the December 5, 2001 receipt date as the filing date of the application.

The best evidence of when particular application papers were actually received by the USPTO is a postcard receipt containing a specific itemization of all the items being submitted. See MPEP 503. In the absence of a postcard receipt indicating the receipt in the USPTO of the application papers on an earlier date, the USPTO must rely on the Official record, which indicates that the instant application papers were not received in the USPTO until December 5, 2001.

In view of the above, the petition is dismissed. No petition fee is required.

The application is being forwarded to Technology Center Art Unit 1645 with the presently accorded filing date of November 5, 2001 for examination in due course.

Telephone inquiries specific to this matter should be directed to the undersigned at (571) 272-3230.

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